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No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1948

TOMAS LAGUNA COVARRUBIAS, PETITIONER

v.

FISH AND GAME COMMISSION, LEE E. PAYNE, AS CHAIRMAN THEREOF, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This case involves the constitutionality of Section 990 of the Fish and Game Code of California, as amended in 1945 (Cal. Stats. 1945, ch. 181) to provide that commercial fishing licenses may be issued only to persons other than those "ineligible to citizenship." The Government is submitting this brief because the constitutional questions presented have substantial national importance, affecting the civil rights of many persons and groups residing within the United States. In our view, Section 990, in so far as it prohibits licensing of persons ineligible to citizenship, is invalid on three separate grounds:

1. It denies petitioner the equal protection of the laws, in violation of the Fourteenth Amendment.

2. It constitutes an unwarranted limitation upon petitioner's privilege—derived from federal law—to enter and remain within the United States and any State.

3. It is in conflict with provisions of the Civil Rights Act of 1870.

I

In adopting eligibility for citizenship as a standard governing issuance of commercial fishing licenses, California has incorporated in its laws a classification based primarily on race and color. The nationality law enacted by the first Congress on March 26, 1790, restricted eligibility for citizenship to "free white persons." 1 Stat. 103. This provision was not enlarged until after the Civil War, when the Act of July 14, 1870, extended eligibility "to aliens of African nativity and to persons of African descent." 16 Stat. 254, 256. A third racial group, descendants of races indigenous to the Western Hemisphere, was added by the Nationality Act of 1940. 54 Stat. 1137, 1140. In 1943, "Chinese persons or persons of Chinese descent" were included as a fourth eligible racial group. 57 Stat. 600, 601. And, in 1946, Filipinos and persons of races indigenous to India were made eligible. 60 Stat. 416. These statutory provisions have been codified in Section 703 of Title 8 of the United States Code.

The wisdom or constitutionality of these enactments need not concern us here. It is important only to recognize that Congress, in defining the groups eligible for citizenship, has drawn lines based on race and color. This Court, in construing the naturalization laws, has noted that Congress has employed a "racial and not an individual test." *Ozawa* v. *United States*, 260 U. S. 178, 197. In *Toyota* v. *United States*, 268 U. S. 402, 412, the Court observed that "it has long been the national policy [as to naturalization] to maintain the distinction of color and race." See also *United States* v. *Thind*, 261 U. S. 204. The point need not be labored, for in *Oyama* v. *California*, 332 U. S. 633, decided at this Term, the Court held that an identical classification appearing in California's Alien Land Law involved a racial discrimination.

The parties and the state courts in this case have been much occupied with the question whether the challenged provision in Section 990 is "anti-Japanese."[1] Quite apart from its merits,

[1] In 1943 Section 990 was amended to read: "A commercial fishing license may be issued to any person other than an alien Japanese." (Cal. Stats. 1943, ch. 1100.) At the 1943 session of the California legislature, the Senate appointed a fact-finding committee on the subject of Japanese resettlement, which filed its Report on May 1, 1945 (R. 17). (A copy of this Report has been lodged with the Clerk of this Court.) With respect to fishing by Japanese, the Committee reported as follows (pp. 5–6):

> The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and

the controversy on this question seems entirely unnecessary to the decision of this case. The Supreme Court of California, in sustaining the validity of Section 990, considered it important that when the 1945 amendment to the section was passed, the federal naturalization laws prohibited not only Japanese but also Hindus and Malayans from becoming citizens of the United States (R. 40–42). We have difficulty, however, in perceiving how this can meet the fundamental constitutional objections to the provision. The racial barrier erected by the statute is no less unconstitutional because it shuts out not merely Japanese but other so-called Asiatic races as well. The difficulty with Section 990, as amended in 1945, is not so much that it applies, or was intended to apply, principally against Japanese, but rather that it draws a line which, in substance and effect, is based on race and color. A measure which is bad because it unjustifiably discriminates against one racial group is not made better because it also

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operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is a danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committe has introduced Senate Bill 413 to make this change in the statute.

Senate Bill 413 was passed, thus resulting in Section 990 in its present form (R. 17).

discriminates against other such groups. If petitioner were a Malayan, his attack on the constitutionality of Section 990 would surely have no less merit.

Clearly, then, Section 990 draws a line based on race and color. We do not contend, of course, that the presence of such an element of discrimination in a state statute terminates inquiry into its validity. It does, however, impose an obligation upon the State to show justification sufficient to overcome the *prima facie* invalidity of a racial discrimination.

It is hardly necessary to review the controlling principles of adjudication in this field. This Court proceeds on the premise that "our Constitution is color-blind."[2] Distinctions based on race or color alone cannot ordinarily withstand constitutional scrutiny.[3] The Court's approach to racial discriminations was described in *Korematsu* v. *United States*, 323 U. S. 214, 216, as follows:

> all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It

[2] This descriptive phrase is no less accurate because it is taken from a dissenting opinion. See Mr. Justice Harlan in *Plessy* v. *Ferguson*, 163 U. S. 537, 559.

[3] See, e. g., *Buchanan* v. *Warley*, 245 U. S. 60; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239 U. S. 33; *Hill* v. *Texas*, 316 U. S. 400; *Strauder* v. *West Virginia*, 100 U. S. 303.

> is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Mindful that the Fourteenth Amendment was principally intended "to prevent state legislation designed to perpetuate discrimination on the basis of race or color" (*Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94), the Court will make the most searching inquiry into the sufficiency of any grounds asserted as justification for invasion of fundamental civil rights. See *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Follett* v. *McCormick*, 321 U. S. 573, 577; *Marsh* v. *Alabama*, 326 U. S. 501, 509; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4.

That Section 990 involves a racial discrimination with respect to a basic constitutional right can hardly be doubted. Because he is a Japanese, petitioner Takahashi has been denied the right to earn a livelihood by pursuing his accustomed calling. Petitioner is not an amateur who fishes for sport or pleasure. Fishing on the high seas has been his occupation since 1915. And it is the right to earn a living in this way—perhaps the only way he knows—that petitioner complains has been denied him by Section 990. It is settled that the Constitution prohibits discriminations against persons, on the grounds of race or ancestry, which

prevent them from engaging in a business or occupation. See *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239 U. S. 33; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; cf. *Kotch* v. *Pilot Commissioners*, 330 U. S. 552. In *Truax* v. *Raich*, *supra*, at 41, the Court held that a State's police power

> does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

And in the *Kotch* case, *supra*, at 556, the Court said:

> An example [of denial of equal protection of the laws] would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities.

Mr. Justice Rutledge, writing in dissent for himself and Justices Reed, Douglas, and Murphy, stated:

> Classification based on the purpose to be accomplished may be said abstractly to be sound. But when the test adopted and applied in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power.

(330 U. S. at 565–566.)

We come, next, to the question whether the racial discrimination embodied in Section 990 can be justified—or, to put it in a slightly different way, whether there is any rational and constitutionally supportable basis for making denial of commercial fishing licenses hinge upon the applicants' eligibility or ineligibility for citizenship. The line drawn by Section 990, it must be emphasized, is not between aliens and citizens. In support of the reasonableness of distinguishing between citizens and aliens generally, it has sometimes been suggested that aliens as a class are less familiar with the laws and customs of this country than are citizens, and that their status as aliens may be regarded as signifying a lesser degree of attachment to our principles and institutions. See *Clarke* v. *Deckebach*, 274 U. S. 392, 394. Whatever may be said as to the persuasiveness of these

arguments in other contexts, they are wholly irrelevant here. The line here is not between aliens and citizens but between two types of aliens, depending upon their eligibility for citizenship.[4] And there is wholly lacking any indication that eligibility for citizenship, as prescribed by federal law, bears any rational relation to conservation, or to the police power, or to any other interest which a State may properly protect in establishing standards governing issuance of fishing licenses.

The 1945 amendment to Section 990 can hardly be justified as a conservation measure. Nothing in its provisions or in its legislative background and history has been cited to support such a claim. It limits neither the number of licenses nor the amount of fish which licensees can take. Both the 1945 amendment and its 1943 precursor were enacted in a period during the war when both federal and State authorities were doing everything possible to enlarge food production to meet ever-increasing needs. It is unnecessary to repeat here the impressive evidence assembled by petitioner to refute the assertion that the discrimination

[4] For this reason, cases like *Heim* v. *McCall*, 239 U. S. 175, and *Crane* v. *New York*, 239 U. S. 195 (statute distinguishing between aliens and citizens for employment on public works), *Patsone* v. *Pennsylvania*, 232 U. S. 138 (statute prohibiting aliens from killing wild game), and *McCready* v. *Virginia*, 94 U. S. 391 (statute prohibiting non-residents of state from planting oysters in its territorial waters), are not controlling here.

made by Section 990 was intended as a conservation measure. (Brief, pp. 24–32.) But even if it be assumed that conservation was the purpose of the statute, no rational connection has been shown to exist between the effectuation of such a purpose and the exclusion of certain groups, identifiable solely on the basis of race or color. This Court has said of the Fifteenth Amendment that it "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275. No sophistication is necessary to preceive the discrimination here.

It is argued, however, that California, in adopting "eligibility to citizenship" as a classification, has merely followed the lead of Congress, and that if it is proper for Congress to draw such a line for naturalization purposes, it is surely not improper for a State to adopt the same line for its purposes. We are not here concerned with the extent to which the power of Congress over immigration and naturalization is subject to constitutional limitations. Assuming that power to be "plenary" and not subject to requirements of equal protection of the laws, it does not necessarily follow that a classification which can be upheld as an exercise of such power by Congress is valid when adopted by a State in exercising another and wholly different power. The classification adopted by the State must be judged on its own merits by constitutional standards appropriate in determining the validity of State enact-

ments. It could hardly be contended that the ordinance invalidated by this Court in *Buchanan v. Warley*, 245 U. S. 60, for example, would have been less unconstitutional if it had involved a discrimination based not expressly upon race but upon "eligibility to citizenship."

Nor can the discrimination involved in Section 990 be justified by any peculiar relationship of the State to wild fish and game. The opinion of the Supreme Court of California asserts that "the state is the owner of the fish in coastal waters and may regulate the taking of them for private use." (R. 36.) The argument implicit in this assertion seems to be that, in dealing with fish and game, the State is in effect unrestrained by any constitutional limitations. In our view, however, the constitutionality of Section 990 is not enhanced by the circumstance that the subject-matter of the regulation is fishing. We think the statute stands on precisely the same constitutional footing as if it involved a license to engage in the laundry business or any other occupation or activity which California has a right to regulate in the public interest.

It should be noted, moreover, that petitioner explicitly disavows any claim "to take fish in which the State of California has or can rightly claim a proprietary interest" (Br. p. 10). But even if petitioner had asserted a right to fish, not on the high seas outside the territorial jurisdiction of California, but in waters within such

jurisdiction, we submit that Section 990 would be equally invalid if it were applied to deny him such right.[8] The respondent's argument relies on expressions in a number of opinions, beginning with *Geer* v. *Connecticut*, 161 U. S. 519, in which this Court has spoken of a State as in some sense the owner of animals *ferae naturae* found within its borders. See *Silz* v. *Hesterberg*, 211 U. S. 31; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Lacoste* v. *Department of Conservation*, 263 U. S. 545; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1; *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422. The fictional basis of any characterization of the State as having a "proprietary interest" was demonstrated by Mr. Justice Holmes in *Missouri* v. *Holland*, 252 U. S. 416, 434:

> The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not

[8] The power of a State to regulate fishing in navigable waters is based upon its governmental authority, and not upon its ownership of the fish; and even this power is qualified and depends upon the absence of any conflict with federal regulations. See *Skiriotes* v. *Florida*, 313 U. S. 69, 75, and cases cited.

> in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.

A State's unquestionably valid interest in conservation has been held to support, as against attack on due process grounds, general regulations designed to eliminate certain methods of processing fish after their capture. *Bayside Fish Company* v. *Gentry*, 297 U. S. 422. Similarly, the same interest has been held under the Commerce Clause to justify various general limitations on the capture, possession, and transportation out of the State of wild game. *Geer* v. *Connecticut*, 161 U. S. 519; *Silz* v. *Hesterberg*, 211 U. S. 31; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Bayside Fish Company* v. *Gentry*, *supra*. In each case, however, the decision was based, not on any notion that the State in dealing with fish and game was beyond constitutional restriction, but rather on an evaluation of the legitimate interest of the State in conservation, as a factor affording rational justification for the regulation. In other cases this Court has shown no reluctance in rejecting an asserted claim of State authority where it was found either to conflict with a paramount federal right or to infringe constitutional prohibitions. Thus, in *Missouri* v. *Holland*, *supra*, the State's as-

sertion of exclusive control over wild game did not prevail against paramount federal authority under the treaty-making power. And in *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, the Court struck down, as a prohibited interference with interstate commerce, restrictions on the extra-State transportation of shrimp.*

To describe a State's interest as "proprietary" rather than "governmental," or to characterize the right to fish as a "privilege," cannot serve to relieve a State from the duty imposed by the Fourteenth Amendment to refrain from unjustifiable racial discriminations. In other contexts, this Court has declared that a State may not exercise even its rights of proprietorship so as to infringe the civil rights of those subject to its jurisdiction. Thus, in *Hague* v. *Congress for Industrial Organization*, 307 U. S. 496, 516, it was stated (opinion of Roberts, J.) that the undoubted powers of a municipality over the use of parks, streets, and public buildings owned by it could not "be made the instrument of arbitrary

* See, also, *McCready* v. *Virginia*, 94 U. S. 391; and *Patsone* v. *Pennsylvania*, 232 U. S. 138. The latter case upheld a Pennsylvania statute which prohibited any alien to kill wild game. The case apparently involved hunting for sport rather than as a means of livelihood. The Court, on the record before it, regarded the statute as genuinely aimed at the conservation of wild game, stating that "this court has no such knowlege of local conditions as to be able to say that it [the state legislature] was manifestly wrong" in concluding that "resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." (232 U. S. at 144–145.)

suppression of free expression of views on national affairs." See also *Jamison* v. *Texas*, 318 U. S. 413; *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517; cf. *Kotch* v. *Pilot Commissioners*, 330 U. S. 552.

II

Quite apart from its inability to measure up to the requirements of the equal protection clause of the Fourteenth Amendment, Section 990, as amended in 1945, constitutes an invalid incursion in the field of immigration and naturalization—in which federal regulatory authority is, of course, supreme. *Hines* v. *Davidowitz*, 312 U. S. 52; *Eong Yue Ting* v. *United States*, 149 U. S. 698; *Henderson* v. *Mayor of City of New York*, 92 U. S. 259; *Holmes* v. *Jennison*, 14 Pet. 540, 570. This Court stated in *Hines* v. *Davidowitz*, *supra*, at 65–66:

> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens * * * bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one. * * * And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty "To establish an Uniform Rule of Naturalization * * *."

Cf. *United States* v. *Belmont*, 301 U. S. 324, 331; *United States* v. *Pink*, 315 U. S. 203, 222–223.

In the exercise of its constitutional powers, Congress has enacted, in Title 8 of the United States Code, a comprehensive and integrated system of immigration and naturalization laws. These provisions define with particularity the terms and conditions on which aliens are permitted to enter and remain within this country. Congress has prescribed who may enter the country and under what conditions (Sections 100–246), who shall be deported and for what causes (Sections 154–157), and who shall be entitled to apply for citizenship and under what terms (Section 501 *et seq.*). Title 8 further provides specific protection of the civil rights of aliens while residing within our borders (Section 41; see Point III, *infra*, pp. 21–23).

We do not here contend that Section 990 is invalid merely because it is a State regulation affecting aliens. As stated in *Hines* v. *Davidowitz*, *supra*, p. 67, there is no "infallible constitutional test" or "exclusive constitutional yardstick" for determining the validity of a State regulation within a field in which the power of Congress is supreme. The primary function of this Court is to decide whether, upon evaluation of all the relevant factors, the State regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ibid.* In considering such an issue, the Court will be mindful that

> it is of importance that this legislation is in a field which affects international rela-

> tions, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

Hines v. *Davidowitz, supra,* at p. 68.

In Point I, *supra,* we have argued that Section 990 denies petitioner the equal protection of the laws, and in support of that contention have cited *Truax* v. *Raich,* 239 U. S. 33. But that case goes even further. In its opinion, the Court stated (p. 42):

> The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country

under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

Petitioner was admitted to the United States lawfully, pursuant to authority granted by Congress. He thereby obtained "the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union." *Truax* v. *Raich, supra,* at 39. Congress has not limited the right of immigration solely to those who are eligible for citizenship.[1] As a peaceful, law-abiding resident alien, petitioner is entitled to the full and equal protection of the laws, which is "a pledge of the protection of equal laws." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369. The protection which the Constitution affords to civil rights extends to all persons within the country, without distinction as to their nationality. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 724; *Home Insurance Company* v. *Dick,* 281 U. S. 397, 411; *Yick Wo* v. *Hopkins, supra; Bridges* v. *California,* 314 U. S. 252; *Colyer* v. *Skeffington,* 265 Fed. 17, 24 (D. Mass.). And, in securing the rights of resident aliens, Congress has taken affirmative action by translating these general con-

[1] The relevant statutory provisions are collected in Reitzel, *The Immigration Laws of the United States—An Outline,* 32 Va. L. Rev. 1099, 1106–1112.

stitutional safeguards into specific statutory commands. R. S. 1977; 8 U. S. C. sec. 41. Cf. *Fay* v. *New York*, 332 U. S. 261; 282–283.

By imposing an unjustifiable limitation on petitioner's capacity to earn a livelihood, California has placed a substantial restriction on the exercise of his right—derived from Congress—to enter and abide in the United States and any State. The probable effect of Section 990 is to deter alien Japanese fishermen from entering and remaining in the State, and this, as petitioner argues, may well have been its principal purpose. See the concurring opinions of Mr. Justice Black and Mr. Justice Murphy in *Oyama* v. *California*, 332 U. S. 633 at 649, 657; cf. *Estate of Yano*, 188 Cal. 645, 658. Such a restraint on the exercise of a right conferred by federal law is no less invalid because it is not an absolute prohibition. State taxes and other exactions upon the landing of immigrants have been held invalid even though they fell far short of excluding aliens entirely. *Henderson* v. *Mayor of City of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59. In invalidating a California statute imposing fees upon immigrants arriving from foreign ports, this Court said (*Chy Lung* v. *Freeman*, *supra*, at 280):

> The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to

> regulate commerce with foreign nations, the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

The invalidity of Section 990 as an intrusion upon national authority is further emphasized by the fact that its prohibition against issuance of commercial fishing licenses is directed only against aliens who are ineligible for citizenship. That such aliens cannot, under present federal laws, qualify for citizenship affects in no way either the legality of their entry into the United States or their right to remain within this country and to enjoy the equal protection of its laws. In precluding such aliens from citizenship, Congress has placed no stigma upon them and has passed no judgment as to their morals or good character. Congress has merely, for reasons which it deemed sufficient and proper, denied to such persons the privilege of becoming American citizens. By barring these aliens from one of the common occupations, California has burdened them with a substantial civil disability, solely because of their status under the federal naturalization laws. There is no reason to believe that Congress intended that such consequences should flow from its action in denying some aliens the privilege of citizenship.

III

A third ground for invalidation of Section 990 is that it is in conflict with Section 16 of the Civil Rights Act of 1870 (16 Stat. 140, 144), now appearing as Section 1977 of the Revised Statutes (8 U. S. C. Sec. 41). This section provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

There can be no doubt that the protection of this statute extends to aliens as well as to citizens. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 696. The provisions of R. S. 1977 find their origin in Section 1 of the Civil Rights Act of April 9, 1866 (c. 31, 14 Stat. 27), which provided for the protection of civil rights of Negroes. Four years later, Congress enacted Section 16 of the Civil Rights Act of 1870, which extended similar protection to all persons within the jurisdiction of the United States. The legislative history of the Civil Rights Act of 1870 shows that it was intended to

confer upon aliens the same civil rights which had already been guaranteed to Negroes. Congressional Globe, 41st Cong., 2d Sess., pp. 1536, 3658; Flack, *Adoption of the Fourteenth Amendment*, pp. 219, 221.

The constitutional validity of R. S. 1977, as applied to aliens, does not rest solely upon the power of Congress to enforce the Fourteenth Amendment. This Court has indicated several sources of the power of Congress to control the admission and residence of aliens. *Turner* v. *Williams*, 194 U. S. 279, 290; *Hines* v. *Davidowitz*, 312 U. S. 52, 62–66. It may be founded on the power to regulate foreign commerce (cf. *Head Money Cases*, 112 U. S. 580, 591; *Henderson* v. *Mayor of City of New York*, 92 U. S. 259, 270–274), or on the power to conduct the foreign relations of the United States (cf. *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711, 712), or it may arise as an incident of the sovereignty of the United States (cf. *Chae Chan Ping* v. *United States*, 130 U. S. 581, 602–609; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 705, 711; *Wong Wing* v. *United States*, 163 U. S. 228, 231; *Tiaco* v. *Forbes*, 228 U. S. 549, 556–557; *Mahler* v. *Eby*, 264 U. S. 32, 39).

Whatever its basis, there can be no doubt as to the supreme power of Congress to "prescribe the terms and conditions upon which aliens may enter or remain in the United States." *United States*

Cf. rel. Volpe v. *Smith,* 289 U. S. 422, 425. The Civil Rights Act of 1870 constitutes a legitimate exercise of that power. It commands that aliens shall have "the same right in every State and Territory * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, *and shall be subject to like* punishment, pains, penalties, taxes, *licenses,* and exactions of every kind, and to no other." (Italics added.)

Congress has thus forbidden any State to impose unwarranted discriminations upon resident aliens, simply because they are aliens. We do not argue that aliens and citizens must be treated identically for every purpose. We do argue that if a distinction is drawn, it must be justified by considerations of "pressing public necessity" (cf. *Korematsu* v. *United States,* 323 U. S. 214, 216) upon which the State bases its action. It may well be that legitimate State interests, such as conservation of its resources or maintenance of the peace, may in some situations justify different treatment of aliens. It is clear that "racial antagonism never can." *Korematsu* v. *United States, supra.*

CONCLUSION

It is respectfully submitted that Section 990 of the Fish and Game Code of California, in so far as it prohibits issuance of licenses to persons ineligible to citizenship, is unconstitutional, and

that the judgment of the Supreme Court of California should be reversed.

TOM C. CLARK,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.
PHILIP ELMAN,
JAMES L. MORRISSON,
Special Assistants to the Attorney General.

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